85-523

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RAMIRO ARANGO, Petitioner

v.

COMPANIA DOMINICANA,
de AVIACION, Respondent

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Ramiro ARANGO and Gabriella Arango, Individually, etc., et al., Plaintiffs-Appellants,

v.

GUZMAN TRAVEL ADVISORS CORPORATION, etc., et al., Defendants-Appellees.

No. 79-1280.

United States Court of Appeals, Fifth Circuit.

July 25, 1980.

Based on nonperformance of vacation tour contract and the injuries and inconveniences suffered in "involuntary rerouting" from Dominican Republic vacation site, plaintiffs brought suit in state court against four defendants, all alleged to have collaborated in the marketing and formation of the package tour so as to create a joint venture for purposes of the action arising therefrom. One defendant, the national airline of

the Dominican Republic, removed the claims to federal district court. On appeal from an order of the United States District Court for the Southern District of Florida, at Miami, James Lawrence King, J., dismissing suit against the airlime, the Court of Appeals, Reavley, Circuit Judge, held, inter alia, that the removal statute, when invoked by a "foreign state" defendant, operates to remove the entire action pending in state court against all defendants, private and domestic, as well as the foreign sovereign; accordingly, in the instant case, when the national airline of the Dominican Republic removed plaintiffs' claims against it to federal court, it carried with it the remaining parties in the state proceeding; thus, the order of dis-

missal as to the airline did not adjudicate the rights and liabilities of all parties and was not an appealable final judgment.

Appeal dismissed and cause remanded.

1. Federal Courts --542

Though neither party raised the issue of appealability, it is axiomatic that the Court of Appeals may, indeed must, undertake such a jurisdictional inquiry sua sponte. 28 U.S.C.A. §§ 1291.

2. Federal Courts --599,660

Ordinarily, an order, however designated that adjudicates the rights and liabilities of fewer than all parties is not final or appealable unless the district court "certifies" appealability by making an express determination that there is no just reason for delay and

then explicitly directs the entry of judgment on the order; this principle applies even to dismissals based on jurisdictional or immunity grounds not pertinent to the rights and liabilities of the remaining parties. 28 U.S.C.A. §§ 1291; Fed.Rules Civ.Proc. Rule 54(b), 28 U.S.C.A.

3. Federal Courts --600

Removal of Cases --58

Removal statute, when invoked by a "foreign state" defendant, operates to remove the entire action pending in state court against all defendants, private and domestic, as well as the foreign sovereign; accordingly, in the instant case, when national airline of the Dominican Republic removed plaintiffs' claims against it to federal court, it carried

with it the remaining parties in the state proceeding; thus, the order of dismissal as to the airline did not adjudicate the rights and liabilities of all parties and was not an appealable final judgment. 28 U.S.C.A. §§ 1291, 1441(d); Fed.Rules Civ.Proc. Rule 54(b), 28 U.S.C. A.

4. International Law -- 10.33

While defendant national airline, wholly owned by the Dominican Government, undisputably was a "foreign state" as defined for purposes of the Foreign Sovereign Immunities Act, it failed to demonstrate, with respect to the entirety of plaintiffs' action against it, that the claims did not lie within any exception specified in the Act; although the airline's actions in connection with the

"involuntary re-routing" of the vacation tour plaintiffs were not commercial and thus did not come within exception to the blanket grant of immunity, the same could not be said of plaintiffs' claims for breach of warranty and contract based on the miscarriage and nonperformance of the tour and apparent failure of defendants to refund the price paid. 28 U.S.C.A. §§ 1603(a), (d, e), 1604, 1605-1607, 1605(a)(2).

5. International Law --10.8

Act of state doctrine is an embodiment of the deference to be accorded the sovereignty of other nations; it averts potential diplomatic embarrassment from the courts of one sovereign sitting in judgment over the public acts of another.

6. International Law --10.8

Act of state doctrine does not simply relieve the foreign government of liability for its acts, but operates as an issue preclusion device, foreclosing judicial inquiry into the validity or propriety of such acts in litigation between any set of parties.

7. International Law --10.9, 10.33

Plaintiffs' battery and false imprisonment claims against airline wholly owned by the Dominican Republic were foreclosed under the act of state doctrine, as well as under the Foreign Sovereign Immunities Act, since those claims would, by definition, require an adjudication of the propriety and legality of the acts of the Dominican immigration authorities--and, more, specifically, of airline employees

while effectively deployed as agents of that government under orders of those authorities-in the performance of their official governmental duties in denying plaintiffs entry into the Dominican Republic and effecting their removal. 28 U.S.C.A. §§ 1604.

8. International Law --10.8

Act of state doctrine only precludes judicial inquiry into the legality, validity and propriety of the acts and motivations of foreign sovereigns acting in their governmental roles within their own boundaries; it does not preclude judicial resolution of all commercial consequences stemming from the occurrence of such public acts.

9. International Law --10.9

Sale of airline tickets and tourist

cards to plaintiffs by the national airline of the Dominican Republic and its activities and omissions in connection therewith, which took place wholly in the United States, were not "acts of state" insulated under the act of state doctrine.

10. Carriers --280(1.), 303(7)

Under the law of Florida, the state in which contract for air transportation was executed and in which performance commenced, common carrier was required to exercise the highest degree of care, foresight, prudence, and diligence toward its passengers; this specifically included a duty to warn a passenger, upon the purchase of a ticket, of potential dangers from third parties at the point of arrival.

11. Carriers --303(1)

If plaintiffs could demonstrate

either that defendant national airline of the Dominican Republic, with knowledge of a list of undesired foreigners who would be denied entry into the Dominican Republic, sold plaintiffs "tourist cards" upon the false assertion that those cards, alone, would assure their entry into the country, or that the airline had access to list, knew or should have known that plaintiffs' names were on it, and therefore that the object of their vacation tour contract was impossible, yet proceeded to arrange for their vacation air transportation, a cognizable claim against the airline would be proved.

Appeal from the United States District Court for the Southern District of Florida.

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

Plaintiffs-appellants, Ramiro Arango and his family, attack the district court's dismissal of their tort and breach of contract claims against appellee, Compania Dominicana de Aviacion ("Dominicana"), the national airline of the Dominican Republic. Dominicana, one of four defendants against whom suit had originally been filed in a Florida State court, had removed the claims to federal district court pursuant to 28 U.S.C. §§ 1441(d). We conclude that §§ 1441(d) operated to remove the claims against the remaining state court defendants, as well, and, consequently, that the order dismissing Dominicana, alone, did not

constitute a final judgment appelable under 28 U.S.C. §1291 because it failed to adjudicate the rights and liabilities of all parties properly before the court. Fed.R.Civ.P. 54(b). Therefore, we dismiss the appeal.

The Arangos' claims arose from the events of an abortive package vacation tour from Miami, Florida to the Dominican Republic. The Arangos' jaunt terminated abruptly and prematurely when Dominican immigration officials denied them entry into that country upon their arrival at the airport in Santo Domingo, apparently because of their inclusion on an official list of "undesirable aliens". The officials then compelled the Arangos' immediate, "involuntary re-routing" back to the United States via Dominicana, the air

carrier on which they had arrived. Because of the unavailability of immediate return flights directly to Miami, the requirement that the Arangos leave the country resulted in their being shunted first to San Juan, Puerto Rico, and the next day to Port-au-Prince, Haiti, where they apparently were left to arrange and pay for their own return to Miami, which they finally were able to accomplish four days later.

Based on the non-performance of the facation contract and the sundry injuries and inconveniences suffered in their "involuntary re-routing", the Arangos brought suit in state court against four defendants, all alleged to have collaborated in the marketing and formation of the package tour so as to create a joint ven-

ture for purposes of the action arising therefrom: Guzman Travel Advisors Corp., a Florida corporation and the actual purveyor of the package tour; Trailways Travel & Tourism International Corp., also a Florida corporation and the tour organizer; Sheraton Hotels & Inns, World Corp., a foreign corporation whose local hotel was to provide food and lodging; and the appellee here, Dominicana, which was to provide air transportation and "tourist cards" necessary for entering the Dominican Republic and which had been responsible for the Arangos' carriage during their "re-routing" to the United States. Wholly owned by the Dominican government, Dominicana exercised its prerogative under the relevant provisions of the Foreign Sovereign Immunities Act of

1976 ("FSIA") as a "foreign state," 28 U.S.C. §§ 1603,[1] to remove the action to

1. 28 U.S.C.§§ 1603 provides, in pertinent part:

> For purposes of this chapter-
> (a) A "foreign state"...includes ...an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) An "agency or instrumentality of a foreign state" means any entity-
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country (emphasis added).

federal district court pursuant to

28 U.S.C. §§ 1441(d)[2]. Once in federal court, Dominicana moved to dismiss the action under Fed.R.Civ.P. 12(b) (1), (6), arguing first, that as a foreign sovereign, it was immune from the jurisdiction of the court under the pertinent provisions of the FSIA, 28 U.S.C. §§§ 1604-07; and second, that the Arangos' complaint stated no claim upon which relief

2. 28 U.S.C. §§ 1441(d) provides:

> (d) Any civil action brought against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

could be granted because all alleged injuries derived from the official acts of Dominican immigration authorities, which acts are insulated from judicial scrutiny in United States courts by the "act of state" doctrine. Without specifying upon which ground it relied, the district court granted the motion and dismissed the suit against Dominicana.

I. APPEALABILITY OF THE ORDER

(1) The question that must precede review of the order of dismissal as to Dominicana is whether that order is at this point a final judgment within our appellate jurisdiction., 28 U.S.C. §§ 1291. Though neither party raised the issue of appealability, it is axiomatic hat this court may, indeed must, undertake such a jurisdictional inquiry sua

sponte. Oswalt v. Scripto, Inc., 616 F.2d 191, 192 (5th Cir. 1980).

(2) The basis for our concern here is whether the order dismissing the suit with respect to Dominicana disposed of all parties before the district court. Ordinarily, under Fed.R.Civ.P. 54(b) an order, however designated, that adjudicates the rights and liabilities of fewer than all parties is not final or appealable under §1291 unless the district court "certifies" appealability by making an express determination that there is no just reason for delay and then explicitly directs the entry of judgment on the order. Oswalt v. Scripto, Inc., 616 F.2d at 194; Huckeby v. Frozen Food Express, 555 F.2d 542-545-46 (5th Cir. 1977). See Curtiss-Wright Corp. v. General Electric Co., --U.S.--, 100 S.

Ct. 1460, 1465-67, 64 L.Ed.2d 1 (1980) (guidelines for issuance of rule 54(b) "certificate"). This principle applies even to dismissals based on jurisdictional or immunity grounds not pertinent to the rights and liabilities of the remaining parties. See, e.g., Morrisson v. City of Baton Rouge, 614 F.2d 77 (5th Cir. 1980); Cason v. Owen, 578 F.2d 572, 573-74 (5th Cir. 1978); Huckeby v. Frozen Food Express, 555 F.2d at 545-49.

Since Dominicana was the sole proponent and subject of the dismissal order and since no rule 54(b) "certificate" accompanied that order, our inquiry is directed merely to whether or not there were any other parties properly before the court. This ordinarily simple ques-

tion is complicated here by the uncertain scope of removal under §1441(d). If only the claims against Dominicana were removed to federal court, the order dismissing Dominicana obviously was final. If, on the other hand, Dominicana's §1441 (d) petition precipitated a removal of the entire case involving all defendants, the rights and liabilities of those other defendants have yet to be adjudicated, and, consequently, the dismissal of Dominicana is not yet final or appealable.

The district court, as well as the state court and all the parties involved, apparantently understood the removal to have encompassed only the claims against Dominicana. Neither the record nor minutes of the federal proceeding reflect any filings by any of the other three de-

fendants or any judicial recognition of their presence.[3] The state court proceeded with the claims against the supposedly remaining defendants, and, in fact, later dismissed the action as to Sheraton and Trailways Travel.[4] Nonethe-

3. Curiously, the Arangos did file requests for admissions. Fed R.Civ P.36. directed to Guzman and Trailways Travel with the federal court. R. at 37, 41,42. No answers or further actions on these requests, nor any recognition of them by the court, are indicated in the record, however.

4. Of course, as these two parties will no doubts be chagrined to learn, since we decide here that the removal petition filed by Dominicana effected the removal of the entire action against all parties, all state proceedings in the case subsequent to that court's receipt of the removal petition, including these dismissals, are void. 28 U.S.C. §1446(e); 1A MOORE'S FEDERAL PRACTICE 0.168(3 8), at 515 16 (2d ed 1979). See e.g., Heniford v. American Motors Sales Corp., 471 F.Supp. 328 (D.S.C.1979).

less, while the confusion of the parties and trial courts here is understandable - this appears to be a question of first impression - we are convinced that the better ~~interpretation~~ of §§ 1441(d) is that when a "foreign state" defendant in a multiparty suit removes under that provision, the entire action against all defendants accompanies it to federal court.

The language of §§1441(d) does not expressly address its operation in multiparty lawsuits. Cf. 28 U.S.C. §§1441(c) (explicitly providing for removal of "entire case" when otherwise removable claims are joined with a "separate and independent" non-removable claim). Nonetheless, its legislative history indicates a rather clear congressional intent that

when a "foreign state," joined with other non-foreign codefendants in state court, petitions for removal, it is the action - embracing all defendants - that is to be transferred to federal court. The Report of the House Judiciary Committee in its section-by-section analysis of the FSIA, states that "(n)ew subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought". H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 32, reprinted in (1976) U.S.Code Cong. & Admin. News. pp. 6604, 6631 (emplasis added) hereinafter "H.R.Rep.") See also 14 C. Wright, A. Miller & E. Cooper, Federal Practice &

Procedure §§ 3729 (Supp. 1979).

Since §§ 1441(d) by its terms requires no defendant other than the "foreign state" to assent to or to join the removal petition, the desires as to removal and the citizenship of the non-foreign defendants obviously would be wholly irrelevant and would have warranted no comment by the Committee if the action with respect to them were not also to be removed. Further, by its explicit delineation of the immateriality of domestic, forum-state citizenship of some of the defendants, we are given a reflection of Congress' specific intent that removal of multi-party actions under the aegis of this limited new provision should not be susceptible to the general bar of 28 U.S. C. §§ 1441(b) against removal of multi-

party non-federal-question suits where any defendant is a citizen of the forum state. Thus, the strong inference from the statement quoted above is that Congress understood that a petition under §§ 1441 (d) would effect the removal of the entirety of an action against multiple defendants, foreign or domestic.

The language of the section, though it does not compel this interpretation, certainly accommodates it nicely. Section 1441(d) provides for the removal of "civil actions", not simply claims, involving "foreign state" defendants. The same phrase in the remaining subsections of §§ 1441[5] denotes the entirety

5. The remainder of 28 U.S.C. §§ 1441, the general removal statute, provides:

(a) Except as otherwise pressly provided by Act of Congress,

> any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

of the proceedings in question, not merely those aspects involving discrete federal

claims or parties. Section 1441(b), for example, provides that no "civil action", other than those based on rederal questions, may be removed where there are multiple defendants and any one of them is a citizen of the forum state; the "civil action's" removability is determined as to its entirety, not as to particular claims or parties. See also Naylor v. Case & Mc.Grath, Inc., 585 F. 557, 560-61 (2d Cird. 1978), and 14 C. Wright, A. Miller & E. Cooper, supra §§ 3722 at 573 (pendent jurisdiction allows removal of entire case, federal and claims, under §§1441(a)).

Moreover, the same or similar language in other limited removal provisions, available only to particular types of defendants as is §§ 1441(d), has consistently been construed and applied to ef-

fect the removal of the entire action in multi-party suits. For instance, this court has previously held that when a federal officer exercises his prerogative under 28 U.S.C. §§ 1442(a) (1) to remove any "civil action" commenced against him in state court, the entire case against all defendants, federal and non-federal, is removed to federal court regardless of the wishes of his co-defendants. Fowler v. Souther Bell Telephone & Telegraph Co., 343 F.2d 150, 152 (5th Cir. 1965). Accord, e. g., Murphy v. Kodz, 351 F.2d 163, 165-67 (9th Cir. 1965); Bottos v. Avakian, 477 F.Supp. 610, 611 n. 3 (N.D.Ind.1979); Howes v. Childers, 426 F.Supp. 358, 359 (E.D.Ky. 1977). The same power of removal of the entire cause of action against all parties has

been recognized in cases of removal of "civil actions" in tort against federal employees pursuant to 28 U.S.C., §§ 2679 (d). 14 C. Wright, A. Miller & E. Cooper, supra §§ 3727, at 693. See e.g., Darnell v. Starks, 258 F.Supp. 31 (D.Ore. 1966). Applications of other removal provisions are similarly consistent with our interpretation of §§ 1441(d)[6]. See Farina v.

6. A substantial policy factor also favoring this interpretation is that removal of the entire action ordinarily will promote judicial economy. Particularly where, as here, the claims are commonly lodged against all defendants as a "joint venture" and all such claims arise from a single, interlocked series of transactions, see American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14, 71 S.Ct. 534, 540, 95 L.Ed. 702 (1951), one would justifiably expect to litigate the merits of such claims in a single proceeding.

While the principal purpose of the FSIA was to provide a federal forum for the adjudication of assertions of foreign sovereign immunity. 28

U.S.C. §§ 1602, the federal hearing is not restricted to this issue but must proceed to the merits when the foreign state is found not to be immune. If under §1441(d) all parties, "foreign state" and domestic, are considered to be removed to federal court, in those instances in which the foreign state is found not to be immune, the federal court may proceed to consider the merits of the claims against the domestic defendants, just as it is obliged to do with respect to the non-immune foreign state. See, e.g., Outboard Manne Corp. v. Pezetel, 461 F.Supp. 384 (D.Del.1978). Conversely, when the foreign sovereign is found to be immune and the source of federal removal jurisdiction is thereby withdrawn from the case, the district court is free to exercise its discretion to remand the remaining defendants to state court, and in most instances will no doubt do so. See Overman v. United States, 563 F.2d 1287, 1292 (8th Cir. 1977) (where claims against federal officer, who removed under § 1442(a) (1), were concluded, court strongly suggested use of discretionary remand as to non-federal defendants). Brough v. United Steelworkers of America, 437 F.2d 743, 750 (1st Cir. 1971) (suggesting remand of remaining parties after summary judgment eliminated independent federal jurisdictional base) Murphy

> v. Kodz, 351 F.2d at 167-78. See also United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) (recognizing discretion to maintain or remand claims within the district court pendent jurisdiction when federal jurisdictional basis drops out of case before substantial commitment of judicial resources). In either case the merits of plaintiff's claims may be adjudicated in a single proceeding without a needless duplication of effort and resources.

Mission Investment Trust, 615 F.2d 1068 (5th Cir. 1980) (sanctioning removal of entire action against all defendants in a suit removed by the FDIC pursuant to its sole prerogative provided in 12 U.S.C. §§ 1819(4)); In re Frankling National Bank Securities Litigation v. Andersen, 532 F. 2d 842, 846 (2d Cir. 1976) (same).

(3) From the foregoing, we conclude that Congress intended that §1441(d), when invoked by a "foreign state" defendant, should operate to remove the entire action

pending in state court against all defendants, private and domestic, as well as the foreign sovereign.[7] Accordingly, we

7. The statute, so interpreted, does not entail an unconstitutional arrogation of power to the federal courts. Certainly, it is the conflict between a United States citizen and a foreign state that taps the power of Article III, §2 ("The judicial Power (of the United States) shall extend ...to Controversies between a State, or Citizens thereof, and foreign States, Citizens, or Subjects"). Nonetheless, that power, once flowing, may also extend to closely related claims against other parties not independently susceptible to federal jurisdiction, pursuant to the same rationale that supports the exercise of "pendente party" jurisdiction, see Aldinger v. Howard, 427 U.S. I. 18, 96 S.Ct. 2413, 2422, 49 L.Ed.2d 276 (1976), and the established principle that federal courts are constitutionally able (though, in most instances, not statutorily allowed) to entertain actions between several parties characterized by only "minimal diversity" - i.e., "diversity of citizenship between two or more (adverse parties) without regard to the circumstances that other rival

claimants may be co-citizens" State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31, 87 S.Ct. 1199, 1203, 18 L.Ed.2d 270 (1967).

The rationale underscoring these concepts is that claims not themselves forming a basis for federal jurisdiction may, nonetheless, be within the ambit of the same Article III "controversy" as that giving rise to the federal claim, and therefore be within the federal judicial power over that entire controversy. The bounds of this approach in the situation before us presumably are the same or very similar to those provided by the Supreme Court, in United Mine Workers of America v. Gibbs, for Article III "Cases ... arising under the constitution (or) the laws of the United States" in its delineation of federal judicial power over pendent state claims; that is, the pendent claims and the claim activating federal jurisdiction "must derive from a common nucleus of operative fact" such that one "would ordinarily be expected to try them all in one judicial proceeding" 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 1G L.Ed.2d 218 (1966). See Boudreaux v. Puckett, 611 F.2d 1028, 1030-31 (5th Cir. 1980) applying Gibbs to pendent party question). Ortiz v. United States Government, 595 F.2d 65, 68 71 (1st Cir. 1979)

(same). See also, Aldinger v. Howard, 427 U.S. at 20, 22, 96 S.Ct. at 2423 (Brennan, J. dissenting, applying Gibbs to pendent party question) But see Owen Equipment & Erection Co. v. Kroger,437 U.S. 365, 98 S.Ct. 2396, 2402 n. 10, 57 L.Ed.2d 274 (1978) (assuming, without deciding, that Gibbs formulation accurately measures constitutional scope of "controversies," as well as federal question "cases," in pendent party situation). Certainly the claims against all defendants here fall neatly within this rationale, since all arose from the same acts or series of events surrounding the ill-fated vacation tour for which all defendants allegedly are commonly responsible as joint ventures.

find that when Dominicana removed the Arangos' claims against it to federal court under §§ 1441(d), it carried with it the remaining parties in the state proceeding. Since Guzman, Trailways Travel and Sheraton were, therefore, properly before that court, the order of dismissal as to Dominicana did not adju-

dicate the rights and liabilities of all parties and, therefore, was not an appealable final judgment. Consequently, we hold that the Arangos' appeal of this dismissal must, itself, be dismissed for want of jurisdiction.[8]

8. Appellee, Dominicana, urges us to accept the appeal under the "collateral order doctrine" articulated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949). However "(t)o come within the "small class' of decisions excepted from the final judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment" Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978) (emphasis added). The Cohen doctrine, which should be strictly construed, is unavailing here since, aside from any questions as to the other criteria, the order of dismissal as to Dominicana can be adequately reviewed upon appeal from a judgment disposing of all parties. In re Corrugated Container Antitrust Litigation, 614 F.

2d. 958, 961 (5th Cir. 1980); Huckeby v. Frozen Food Express, 555 F.2d at 549 (denying appealability under Cohen doctrine of doctrine of order dismissing one defendant in a multi-party suit where no one would be "irretrievably injured should immediate appellate review be withheld").

Because some of the theories upon which the district court may have predicated its dismissal of Dominicana may also bear upon the disposition of claims against the other defendants and because rule 54(b) explicitly renders even the order dismissing Dominicana still subject to revision by the district court, we shall, in the interest of expediency, proceed to offer that court some guidance in its further handling of these issues.

II. GROUNDS FOR DISMISSAL

A. Foreign Sovereign Immunity

(4) The first ground presented to the district court on which it may have relied[9] in dismissing the suit against Dominicana is the immunity accorded foreign sovereigns by the FSIA, 28 U.S.C., §§ 1604. Section 1604 - which, of course, has no bearing on the ultimate disposition of the claims against the defendants other than Dominicana - provides a general grant of immunity to "foreign states," subject only to the exceptions delineated elsewhere in the FSIA, 28 U.S.C. §§§ 1605-07. The burden of establishing the applicability of this immunity naturally lay with the one claiming it, Dominicana. H.R. Rep. at 17; Behring International, Inc. v. Imperial Iranian Air Force, 475 F.Supp. 396, 405 & n. 9 (D.N.J.1979). Since Dominicana,

9. As noted above, the district court did not specify the grounds for its order of dismissal.

wholly owned by the Dominican government, undisputedly is a "foreign state" as defined for purposes of the FSIA in §§1603(s), supra note 1, the only question is whether it demonstrated that the Arangos' claims did not lie within any exception specified in §§1605-07. H.R. Rep. at 17 (burden of proving non-applicability of specified exceptions lies with foreign state). We do not believe Dominicana shouldered this aspect of its burden with respect to the entirety of the Arangos' actions against it.

Section 1605(a)(2) provides an exception to the blanket grant of immunity in §§ 1604 for actions "based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of

the foreign state elsewhere. Dominicana has admitted before the district court, in its Memorandum in Support of Its Motion to Dismiss, that its' airline operations, including sales of tickets and "tourist cards," carried on in the United States constitute such acts and "commercial activity" as would trigger §§ 1605(a)(2). R. at 99. See 28 U.S.C. §§ 1603(d), (e) (defining relevant "commercial activity")[10].

10. 28 U.S.C. §§ 1603(d) & (e) provide:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried and having substantial contact with the United States.

It argues, however, that §§ 1605(a) (2) is inapplicable because the Arangos' claims arise not from this commercial activity, but from the acts of Dominican immigration officials in expelling the Arangos from the Dominican Republic and from the events of the noncommercial, "involuntary re-routing" of the Arangos in which Dominicana was compelled by those authorities to participate. With respect to certain of the Arangos' claims, this is true, but as to others it is not.

Two counts of the Arangos' complaint allege false imprisonment and battery stemming from the Arangos' being forcibly placed on board the Dominicana flight from Santo Domingo to San Juan, Puerto Rico by Dominican immigration officers, with the aid of Dominicana employees, in connection with the Arangos' "involuntary re-routing",

and from their allegedly being man-handled during this procedure. In accordance with its argument, above, Dominicana is not answerable to these tort claims. The focus of the exception to immunity recognized in §§ 1605(a)(2) is not on whether the defendant generally engages in a commercial enterprise or activity, as an airline such as Dominicana unquestionably does; rather, it is on whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character. YesseninVolpin v. Novosti Press Agency, 443 F. Supp. 849, 855-56 (S.D.N.Y.1978) (holding generally commercial Soviet news agencies immune for allegedly libellous story produced for official Soviet state publica-

tions); see International Association of Machinists and Aerospace Workers v. OPEC, 477 F.Supp. 553, 568-69 n. 14 (C.D.Cal. 1979).

Dominicana's actions in connection with the "involuntary re-routing" were not commercial. Dominicana was impressed into service to perform these functions, for which it apparently was not compensated, by Dominican immigration officials pursuant to that country's laws. Dominicana acted merely as an arm or agent of the Dominican government in carrying out this assigned role, and, as such, is entitled to the same immunity from any liability arising from that governmental function as would inure to the government, itself. See Papagianakis v. SAMOS, 186 F.2d 257, 261-62 (4th Cir. 1950), cert. denied, 341 U.S. 921, 71 S.Ct. 741, 95 L.Ed. 1354

(1951) (similarly recognizing derivative sovereign immunity for private vessel owners and crew against false imprisonment claim stemming from their incarceration of plaintiffs on board the vessel pursuant to orders from United States immigration officials). See also Peterson v. Weinberger, 508 F.2d 45, 51 52 (5th Cir.), cert. denied, 423 U.S. 830, 96 S.Ct. 50, 46 L.Ed. 2d 47 (1975) (one who acts ad Medicare agent agent fro HEW is cloaked in HEW's governmental immunity).

Arangos' complaint also, however, stated claims for breach of warranty and contract based on the miscarriage and non-performance of the vacation tour and the apparent failure of defendants to refund the price paid for the tour. It further alleged that, because Dominicana knew of

the official list of undesired foreigners forbidden to enter the Dominican Republic and because of its high duty of care as a common carrier, Dominicana was negligent in arranging the Arangos' vacation air transportation without ascertaining whether they would even be allowed to enter the Dominican Republic for the purpose of that vacation or without, at least warning them of the potential danger of exclusion based on that list and its attendant costs and consequences. Each of these claims, and the duties alleged therein to have been breached, arose directly from or in connection with the marketing and execution of contracts-i.e., the sale of airline tickets and "tourist cards" necessary to enter Dominican Republic-by Dominicana, along with the other defendants, in the normal course of its airline business in

the United States. Consequently, while these claims may eventually fail for other reasons, they plainly stem from Dominicana's "commercial activity" in the United States and are, therefore, not barred by foreign covereign immunity. See United Euram Corp. v. U.S.S.R., 461 F.Supp. 609 (S.D.N.Y.1978)(holding no immunity for breach of contract for sale of service); National American Corp. v. Federal Republic of Nigeria, 448 F.Supp. 622 (S.D.N.Y.1978), aff'd, 597 F.2d 314 (2d Cir. 1979).

B. ACT OF STATE DOCTRINE

(5) The second theory proffered to the district court as grounds for dismissal was the act of state doctrine. "The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity

(or legality) of the public acts a recognized foreign sovereign power (has) committed within its own territory." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401, 84 S.Ct. 923, 926, 11 L.Ed.2d 804 (1964). Relegating grievances from acts of this sort to executive channels of international diplomacy, the rule is an embodiment of the deference to be accorded the sovereignity of other nations; it averts potential diplomatic embarrassment from the court of one sovereign sitting in judgment over the public acts of another. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 697, 96 S.Ct. 1854, 1862, 48 L.Ed.2d 301 (1975); Underhill v. Hernandez, 168 U.S. 250, 252, 18 S.Ct. 83, 85, 42 L.Ed. 456 (1897).

(6,7) Unlike foreign sovereign immunity, the act of state doctrine affects the

viability of the Arangos' claims against all defendants. It does not simply relieve the foreign government of liability for its acts, but operates as an issue preclusion device, foreclosing judicial inquiry into the validity or propriety of such acts in litigation between any set of parties. National American Corp. v. Federal Republic of Nigeria, 448 F.Supp. at 640; see, e. g., Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477, (1977) (foreclosing antitrust conspiracy suit against private oil companies that would have required inquiry into alleged untoward motives behind Libya's nationalization of its oil industry). Consequently, the Arangos' battery and false imprisonment claims would be foreclosed under this doctrine, as well as under the

FSIA, since they would, by definition, require an adjudication of the propriety and legality of the acts of the Dominican immigration authorities - and, more specifically, of Dominicana employees while effectively deployed as agents of that government under the orders of these authorities-in the performance of their official governmental duties in denying the Arangos' entry into the Dominican Republic and effecting their removal. See Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897) (foreclosing suit under act of state doctrine against foreign agent who detained American citizen); United States v. Henry, 604 F.2d 908, 942 (5th Cir. 1979) (characterizing exclusion of aliens as a sovereign governtal act).

(8.9) Dominicana urges that, beyond this, since the Arangos' expulsion by Dominican authorities was the precipitating factor for all plaintiffs' claims, all should be foreclosed by the act of state doctrine. This contention accords that doctrine too great a breadth. The act of state doctrine only precludes judicial inquiry into the legality, validity, and propriety of the acts and motivations of foreign sovereigns acting in their governmental roles within their own boundaries;[11] it

11. Dominicana's sale of airline tickets and tourist cards to the Arangos and its activities and omissions in connection therewith, which took place wholly in the United States, are not "acts of state" insulated under the doctrine. Cf. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 605-706, 96 S.Ct. 1861-1866 (plurally of four Justices ruling that act of state doctrine does not apply to purely commercial acts of a sovereign). Accord, Hunt v. Mobil Oil Corp., 550 F. 2d at 73; Behring International, Inc.

v. Imperial Iranian Air Force, 475 F. Supp. at 401.

does not preclude judicial resolution of all commercial consequences stemming from the occurrence of such public acts. See National American Corp. v. Federal Republic of Nigeria, 448 F.Supp. at 639-40. The Arangos' contract and negligence claims require only a determination of the respective rights and duties of the parties in the wake of the sovereign acts of the Dominican immigration authorities; the claims raise the questions of who bears the risk of loss following such an incident and whether there existed a duty on the part of any defendant to protect the Arangos from, or to warn of, the possibility of its occurrence. They do not nenessitate a consideration or evaluation of the legitimacy of those "acts of state",

themselves. Consequently, the act of state doctrine, like the FSIA, should not have required dismissal with respect to the Arangos' contract and negligence claims.

C. Legal Sufficiency of Claims

Finally, though they did not present the question to the district court, the parties have alluded on appeal to whether, independent of the preclusive effects of foreign sovereign immunity and the act of state doctrine, the Arangos have alleged facts presenting a legally cognizable claim. Keeping in mind that a complaint is to be liberally construed in favor of the plaintiff on a motion to dismiss for failure to state a claim, Voter Informa-Project, Inc. v. City of Baton Rouge, 612 F.2d 208, 210 (5th Cir. 1980), we believe that a claim has been stated.

(10) Under the law of Florida, the state in which the contract for air transportation was executed and in which performance commenced, a common carrier such as Dominicana "is required to exercise the highest degree of care, foresight, prudence, and diligence" toward its passengers. Edwards v. Jacksonville Coach Co., 88 So. 2d 543, 544 (Fla.1956) (emphasis added). This has been specifically construed to include a duty to warn a passenger, upon the purchase of a ticket, of potential dangers from third parties at the point of arrival. Werndli v. Greyhound Corp., 365 So.2d 177, 178 (Fla. App.1978) (failure to warn that bus terminal at destination was in high crime area and would be locked upon arrival stated cause of action against carrier for injuries received at

destination at hands of third parties).

In a case closely analogous to this one, the First Circuit in Compagnie Nationale Air France v. Castano, 358 F.2d 203, 208-09 (1st Cir. 1966), ruled that where an international air carrier failed to warn a passenger, upon his purchase of a ticket, that he would be prevented by immigration officials from entering the country of his destination unless he had a proper visa, that carrier would be liable for all damages and injuries proximately flowing from the passenger's exclusion from that country due to his failure to secure a visa.

(11) Dominicana has admitted that it was aware of the list of undesired for eigners and, in fact, had previously transported individuals who had been denied entry into the Dominican Republic on the

basis of that list. R. at 76-77. Without attempting to define all possible grounds of recovery by the Arangos, we can see now that if they can demonstrate either (1) that Dominicana, with the foregoing knowledge, sold them "tourist cards" upon the false assertion that these cards", alone, would assure their entry into the country, or (2) that Dominicana had access to the list, knew or should have known the Arangos' names were on it, and therefore, that the object of their vacation contract was impossible, yet proceeded to arrange for their vacation air transportation, a cognizable claim will have been proved. See Dumas v. Town of Mt. Vernon, 612 F.2d 974, 980 (5th Cir. 1980), quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957) (complaint

should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle him to relief on his claim). Therefore, while there may be flaws in the Arangos' particular theories of recovery that may even be as sailed subsequently on summary judgment, the complaint appears adequate to withstand a motion to dismiss.

For the reasons set forth in Section I of this opinion, the appeal is DISMISSED and the cause is REMANDED.

Ramiro ARANGO and Gabriella Arango individually and as parents and best friends for their minor children, Anna C. Arango and Krishna O. Arango, Plaintiffs-Appellants,

v.

GUZMAN TRAVEL ADVISORS, et al., Defendants,

and

Compania Dominicana De Aviacion, C. Por A. (Dominicana Airlines) Defendant-Appellee.

No. 84-5266

Non-Argument Calendar.

United States Court of Appeals, Eleventh Circuit.

June 4, 1985.

Airline passengers brought suit against the national airline of the Dominican Republic and two other defendants seeking damages arising out of an attempt to vacation in the Dominican Republic. The United States District Court the Southern District of Florida, James Law-

rence King, Chief Judge, rendered judgment in favor of the airline, and passengers appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) absence of default judgment entered against two defendants which were in default for failure to appear did not require dismissal of appeal from judgment in favor of remaining defendant where default judgment could be entered against defaulting defendants on remand since extent of damages had been determined; (2) suit brought against national airline of Dominican Republic, which was removed pursuant to Foreign Sovereign Immunities Act, was properly tried without a jury and (3) airline could not be held liable to passengers for failure to warn them that they might be turned away from Dominican Republic by im-

migration officials since airline's failure to warn was not the cause in fact of passengers' injury.

Affirmed.

1. Federal Civil Procedure 2417

An entry of default is not a default judgment. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

2. Federal Courts 599

Without presence of a certificate under applicable rule, final decision rule ordinarily operates to permit an appeal only from a judgment that finally determines all claims as to all parties. Fed. Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.; 28 U.S.C.A. §§ 1291.

3. Federal Civil Procedure 2417

Default judgment can be entered by clerk of court when a party is in default for failure to appear. Fed.Rules Civ. Proc.

Rule 55(b)(1), 28 U.S.C.A.

4. Federal Courts 722

Absence of default judgment entered against two defendants which were in default for failure to appear did not require dismissal of appeal from judgment in favor of remaining defendant where default judgment could be entered against defaulting defendants on remand since extent of damages had been determined. Fed.Rules Civ.Proc.Rule 55(b)(1, 2), 28 U.S.C.A.

5. Jury 14(1)

Suit brought by airline passengers against national airline of Dominican Republic, which was removed pursuant to Foreign Sovereign Immunities Act, was properly tried without a jury. 28 U.S.C.A. §§ 1330, 1330(a), 1441(d), 1603.

6. Jury 31(1)

Foreign Sovereign Immunities Act's nonjury trial requirement does not offend Seventh Amendment. 28 U.S.C.A. §§ 1330, 1330(a), 1441(d), 1603; U.S.C.A. Const. Amend. 7.

7. Jury 12(1)

Suits brought against the United States may be tried to a jury only if the right is guaranteed by appropriate statute.

8. Constitutional Law 249(7)

Congress' decision to classify commercial entities owned by foreign governments in the same category as the governments themselves, for purposes of Foreign Sovereign Immunities Act's requirement of a nonjury trial, was not violate of equal protection. 28 U.S.C.A. §§ 1330, 1330(a), 1441(d), 1603; U.S.C.A.

Const.Amend. 14.

9. Carriers 262

Airline could not be held liable to passengers for failure to warn them that they might be turned away from Dominican Republic by immigration officials since airline's failure to warn was not the cause in fact of passengers' injury.

10. Fraud 21

Since airline passenger admitted he was aware that each nation had its own rules with respect to admission of tourists, passenger and his wife, who were refused entry into Dominican Republic by immigration officials, could not claim that they relied upon alleged misrepresentations contained in tourist visas purchased from national airline of Dominican Republic which stated terms under which a tourist could travel in the country but

did not purport to guarantee that possesion of a card would ensure entry into the country.

11. Carriers 286,287(1), 303(1)

A common carrier is obligated to exercise a high degree of care with respect to boarding, carriage, and disembarkment of its passengers; furthermore, requirement that carriers exercise that degree of care may extend to provision of terminals into which passengers enter upon exiting the carrier.

12. Carriers 277

National airline of Dominican Republic, which was ordered by immigration officials to transport passengers out of the country on the very next flight leaving for their country of origin, was under no obligation to pay passengers'

food and lodging expenses incurred in San Juan, Puerto Rico.

13. Carriers 262

National airline of Dominican Republic, which was ordered by immigration officials to transport passengers out of Dominican Republic and which issued passengers tickets for passage to San Juan and from San Juan to Miami, did not breach its contract of carriage with passengers, who returned to Miami from Haiti, after passengers voluntarily decided to travel to Haiti instead of returning to Miami.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

KRAVITCH, Circuit Judge:

This litigation, involving an action for damages by a passenger against an airline, has once before travelled the appellate route. See Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980). On the present journey, plaintiffs-appellants, Ramiro Arango and his family, claim that the district court should have tried the case to a jury, and that the court erred in ruling in favor of the defendant-appellee, Compania Dominicana De Aviacion (Dominicana). We conclude that the district court properly denied a jury trial in this action, and correctly rendered judgment in favor of the defendant. Sua sponte, we raised the question whether we have jurisdiction to hear this appeal. We conclude that we do, but we instruct the district court to take appropriate action upon receipt of our re-

mand.

I. BACKGROUND

The Arangos' claim arose out of an attempt to vacation in the Dominican Republic. They arranged their trip through a travel agency by purchasing a "package tour" that included round-trip air transportation between Miami and Santo Domingo via Dominicana. Food, lodging and transportation to and from the Santo Domingo Airport were to be provided by the local Sheraton Hotel. Unfortunately for the Arangos, their vacation plans went awry when, upon their arrival at the Santo Domingo Airport, Dominican Republic immigration officials refused to permit Ramiro Arango to enter the country. Apparently the Government of the Dominican Republic maintained a list of "undesirable aliens," which included Ramiro Arango's name.

Immigration officials ordered Dominicana to take the Arangos out of the country on its next flight departing for their country of origin. Accordingly, the Arangos were taken to San Juan, Puerto Rico, where they spent the night. The next day, they travelled to Port-au-Prince, Haiti. Three days later, the family returned to Miami.

The Arangos initiated this lawsuit in state court in Florida against four defendants; Guzman Travel Advisors Corporation, from whom appellants purchased their tour package; Trailways Travel and Tourism International Corporation, the tour organizer; Sheraton Hotels and Inns, whose Santo Domingo Hotel was to provide food and lodging for appellants during their stay and Dominicana. Their com-

plaint alleged negligence, breach of warranty, breach of contract, false imprisonment, and battery. Dominicana, which is the national airline of the Dominican Republic, wholly owned by that nation's government, removed the lawsuit to federal district court. There, Dominicana filed a motion to dismiss, arguing that (1) it was immune from liability, and (2) the complaint failed to state a claim because all of the alleged injuries were caused by the actions of the Dominican Republic immigration officials, and the Act of State Doctrine precluded judicial scrutiny of these acts. Without specifying the ground upon which it relied, the district court granted the motion to dismiss, and the Arangos appealed. The former Fifth Circuit dismissed the appeal for lack of

jurisdiction because the district court's order did not dispose of the claims against the other defendants; thus, there was not a final appealable order. Arango, 621 F.2d at 1378. Nevertheless, to expedite the litigation, the court offered some definitive guidelines to resolve the plaintiff's claims, id. at 1378-82, and remanded the case to the district court. In accordance with these directives, the district court dismissed defendant Sheraton from the lawsuit. The clerk of the court then issued an entry of default against defendants Guzman and Trailways, both of whom failed to enter an appearance or file a pleading after Dominicana removed the case to federal court. Final judgment, however, was never entered against either party. When Dominicana

moved for summary judgment, the court granted the motion as to the breach of warranty claim, but set the contract and negligence claims for trial. Pursuant to the parties' stipulation that Dominicana was a foreign state within the meaning of 28 U.S.C. §§ 1603(a), the court tried the case without a jury. After the trial, the court entered judgment for Dominicana. This appeal ensued.

II. WHETHER THIS COURT HAS JURISDICTION

Preliminarily, we raise the question, sua sponte, of whether we have jurisdiction to hear this appeal. Upon the motion of the Arangos, the clerk of the court below issued entries of default against defendants Guzman and Trailways. Fed.R.Civ. P. 55(a). Following the trial, the district court judge ruled from the bench in

favor of Dominicana, stating that he would issue his findings and concludions in written form at a later date. The Arangos' attorney reminded the court that two of the defendants were in default. The judge responded that he did not understand how either party could be responsible for the failed vacation, but he stated that "if there is a requirement that they (plaintiffs) be reimbursed, the amount of their actual damages would be the amount of their actual damages would be the amount of the $1,000 for the frustration of their vacation and the amount of their damages in San Juan, which they have alleged or recited to be approximately $75, so those would be the amounts of damages." The court incorporated these conclusions in the order.

(1) Our examination of the record

and the docket sheet, however, indicates that no final judgment was entered against either Guzman or Trailways. An entry of default is not a default judgment. See Fed.R.Civ.P. 55(b) (delineating terms upon which judgment of default may be entered); see also Fed.R.Civ.P. 58 (requiring that every judgment be set forth on a separate document).

(2) Under 28 U.S.C. §§ 1291, "The courts of appeals ... have jurisdiction of appeals from all final decisions of the district courts of the United States." Without the presence of a certificate under Federal Rule 54(b), the final decision rule ordinarily operates to permit an appeal only from a judgment that finally determines all claims as to all parties. Tower v. Moss, 625 F.2d 1161, 1164 (5th Cir. 1980). See generally 10 C. Wright

& A. Miller, Federal Practice and Procedure §§ 2653-2661 (1983).

In Bankers Trust Co. v. Mallis, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (per curiam), the Supreme Court determined that the failure to comport with all procedural rules governing entry of judgments did not necessarily render a court of appeals without jurisdiction. The district court in that case issued a combined opinion and order dismissing the complaint, but failed to issue a separate document entering a final judgment as required by Federal Rule 58. The Supreme Court assumed without deciding that the requirements for an effective judgment set forth in the Federal Rules must be satisfied before an appeal could be brought under section 1291, equating section 1291's

requirement of a "final decision," with a "judgment" under the Federal Rules. 98 S. Ct. at 1119 & n. 4. The Court concluded, however, that the sole purpose of Rule 58's separate document requirement was to clarify when the time for an appeal begins to run. Id. at 1120; see 28 U.S.C. §§ 2197; Fed.R.App.P. 4(a). This purpose would not be furthered by a holding that appellate jurisdiction does not exist without a separate document entering judgment. 98 S.Ct. at 1120. Furthermore, the appellee never objected to the appeal; thus, the Court deemed that the parties had waived Rule 58's requirement. Id. at 1121.

The Bankers Trust decision has been used on several occasions to sustain jurisdiction when there was no separate

document entering judgment, provided that the district court clearly evidenced that it had entered its final decision. See, e.g., Diaz v. Schwerman Trucking Co., 709 F.2d 1371, 1372 n. 1 (11th Cir.1983); Hanson v. Town of Flower Mound, 679 F.2d 497, 500-02 (5th Cir.1982). Some courts have taken jurisdiction even when the appellee objected to the lack of a separate document entering judgment. See, e.g., International Brotherhood of Teamsters v. Western Pa. Motor Carriers Ass'n, 660 F.2d 76, 79-80 (3d Cir.1981) (court did not discuss fact that appellee sought to dismiss appeal on this basis); Leonhard v. United States, 633 F.2d 599, 611-12 (2d Cir.1980) (party who objected failed to show how entertaining appeal would be prejudicial), cert. denied, 451 U.S. 908, 101 S.Ct.

1975, 68 L.Ed.2d (1981).

(3,4) Although we are aware of no reported decision in which a court heard an appeal from a multi-party lawsuit when there was no default judgment entered against a party in default, we believe that the Bankers Trust rationale is applicable here, given the facts of this case. A default judgment can be entered by the clerk of the court, when, as here, a party is in default for failure to appear. Fed.R.Civ.P. 55(b)(1). The Federal Rules do not even require that parties who default for failure to appear receive notice of the default judgment. 6 Moore's Federal Practice (55-05(3) (2d Ed.1983). The Arangos sought to have a default judgment entered at the time they moved for entry of default. The clerk may have re-

fused to enter judgment because the amount of damages was not a sum certain. Fed.R. Civ.P. 55(b)(1). The extent of damages now being determined, we see no obstacle preventing entry of default judgment. The district court was aware that the two defendants were in default and determined the extent of damage without requesting the two defendants to appear at a hearing. See Fed.R.Civ.P. 55(b)(2). The only missing item is an entry of judgment against two parties who have never entered an appearance in this lawsuit from the time it was removed to federal court in 1978. Although dismissal of the appeal might serve to deter careless practice by future litigants we hold that under the circumstances of this case, the absence of the default judgment does not require dismissal. We

instruct the district court to take appropriate action upon receipt of our remand.[1]

III. WHETHER THE DISTRICT COURT CORRECTLY TRIED THE CASE WITHOUT A JURY

(5) Dominicana's removal of the case to federal court was based upon 28 U.S.C. §§ 1441(d), which provides as follows:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury...

This section was part of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602-11, which represented a com-

[1]The liability in this case was not alleged to be joint. Therefore, a judgment in favor of Dominicana is not inconsistent with liability that would be imposed on the defaulting defendants. See 6 J.Moore, Federal Practice (55.06 (2d ed. 1983).

prehensive effort "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereighn immunity". H.R.Rep. No. 1487, 94th Code Cong. & Ad.News 6604, 6604.[2] Prior to enactment of this legislation, jurisdiction over federal actions brought by and against foreign states and their subjects was based upon diversity of citizenship.[3] Jurisdiction over actions invol-

[2]The sovereign immunity issue in this litigation was determined in the prior appellate opinion. Arango, 621 F.2d at 1378-80.

[3]Former 28 U.S.C.§§ 1332(a)(2)provided:

(a)The district courts shall have original jurisdiction over all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between-

(2) citizens of a State, and foreign states or citizens or subjects

thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

ving foreign parties now depends upon classification of the lawsuit according to categories defined by Congress. For example, 28 U.S.C. §§ 1330 provides federal jurisdiction over actions initiated against foreign states:

(a) The district court shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for which relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

A foreign state defined as:

For purposes of this chapter-

(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a for eign state as defined in subsection (b).

(b) An 'agency or instrumentality of a foreign state' means any entity-

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other owner-ship interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third coun-

try.

28 U.S.C. §§ 1603.[4]

By their express terms, 28 U.S.C. §§ 1330 and 14419d) prohibit a case brought against a foreign state, as defined in section 1603, from being tried before a jury, whether the lawsuit is initiated in federal court or removed by the foreign state to that forum. Although an issue of first impression in this circuit, other circuits have considered and rejected efforts to circumvent this prohibition against jury trials, concluding that section 1330(a) is the sole source of federal jurisdiction in suits against foreign states. See McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir.1983), cert. denied, - U.S. - , 105 S.Ct. 243, 83 L.Ed.2d 182 (1984); Goar v. Compania Peruana de Vapores, 688 F.2d

417 (5th Cir.1982); Rex v. CIA. Peruana de Vapores S.A., 660 F.2d 61 (3d Cir. 1981), cert. denied, 456 U.S. 926, 102 S. Ct. 1971, 72 L.Ed.2d 441 (1982); Williams Shipping Corp. of India v. The Way v. Shipping Corp. of India, 653 F.2d 875 (4th Cir.1981), cert. denied, 455 U.S. 982, 102 S.Ct. 1490, 71 L.Ed.2d 691 (1982); Ruggiero v. Compania Peruana de Vapores S.A., 639 F.2d 872 (2d Cir.1981).[5]

4. Jurisdiction over other actions involving foreign parties is based upon 28 U.S.C. § 1332(a)(2) (action between citizen of a state and citizen or subject of a foreign state), (a)(3) (actions between citizens of different states, in which citizens or subject of foreign state are additional parties), and (a)(4) (action between foreign state as plaintiff and citizens of a state or of different states).

5. The Supreme Court's opinion in Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 103 S.Ct. 1962, 1971, 1973, 76 L.Ed.2d 81 (1983), also supports this conclusion.

In Ruggiero, the Second Circuit determined that jurisdiction in a suit against a foreign corporation that falls within the definition of a foreign state cannot also be predicated on diversity of citizenship, even if the amount in controversy exceeds $10,000. 639 F.2d at 875-76. The court further rejected the argument that the presence of a federal question could provide an alternative basis for jurisdiction. Id. at 876. In spurning these arguments, the court observed:

> The courts must learn to accept that, in place of the familiar dichotomy of federal question and diversity jurisdiction, the Immunities Act has created a tripartite division-federal question cases, diversity cases and actions against foreign states. If a case falls within the third division, there is to be no jury trial even it is might also come within one of the other two.

Id. (footnote omitted). The Third,

Fourth, and Fifth Circuits followed the Ruggiero court's decision. Goar, 688 F.2d at 421-23; Rex, 660 F.2d at 64-65; Williams, 653 F.2d at 880-81; see also McKeel, 722 F.2d at 586-87 (following Ruggiero on diversity jurisdiction; federal question jurisdiction fails because of absence of federal issue in well-pleaded complaint).

Rather than retrace the paths of those who have tried and failed in their quest for a jury trial, appellants here argue that Dominicana is not an instrumentality of a foreign state within the meaning of section 1603(a). Although Dominicana is not incorporated in a State within the United States, appellants contend that it has several offices within the United States, parti-

culaŗly Florida, has bank accounts in the United States, and pays taxes to the City of Miami, Dade County, the State of Florida, and the United States. These factors, appellants claim, make Dominicana a "de facto local corporation," and remove it from the definition of an instrumentality of a foreign state. We disagree.

First, appellants' current assertion is contrary to their actions in the court below. When Dominicana removed this litigation to federal court, appellants made a demand for a jury trial, but did not object to the basis for removal, section 1441(a). Only foreign states or their instrumentalities can avail themselves of this removal provision. Moreover, appellants stipulated that this lawsuit is "a civil action seeking in personam relief

against a foreign state as defined in 28 U.S.C. §§ 1603(a)..."[6] Finally, in its pre-trial order, the district court stated that the case was set to be tried without a jury. Appellants never objected to this Order. We do not ordinarily consider arguments on appeal that were not raised in the court below. See Sanders v. United States, 740 F.2d 886, 888 (11th Cir. 1984).

Even had appellants advanced this argument earlier, however, we would not agree. Under the definition offered in section 1603(a), a corporation, a majority of whose shares are owned by a foreign government, is a foreign state unless the corporation is "a citizen of a State of the United States as defined in section

[6] Order Setting Cause for Trial at 1; Record and 462.

1332(c) and (d) of this title", or was "created under tne laws of any third country." 28 U.S.C. §§ 1603(b)(3). Appellants do not argue that Dominicana was created under the laws of a third country. Furthermore, section 1332(c) provides:

> For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which its has been incorporated and of the State where it has its principal place of business.

The district court was presented with no evidence that Dominicana is incorporated in the State of Florida, or that Florida is Dominicana's principal place of business. Appellants cite no cases in support of the view that Dominicana's activities automatically render it a citizen of Florida within the meaning of section 1332(c). Appellants' argument that Dominicana should be treated as a citizen

of Florida because it is a "de facto" Florida corporation is particularly unpersuasive, given Congress' definition of a foreign state. Congress could have chosen to exclude from foreign state status a foreign corporation that does a substantial part of its business in the United States, or one that pays taxes in the United States. It chose not to, and there is no reason to question this judgment.

(6) Appellants argue that to permit jury trials in some actions but not in this one violates the equal protection principles subsumed within the due process clause of the fifth amendment. Their argument is intertwined with the question of whether there is a constitutional right to a jury trial in actions against foreign states. The seventh amendment provides in

part that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved..." The seventh amendment did not create a right to trial by jury. 5 J. Moore, Federal Practice (38-08(5) at 38-55 (2d. ed. 1984). Rather, the amendment functions to preserve the right that existed with respect to particular kinds of actions at common law. The reference to "common law" requires that we examine the common law of England in 1791, the year the seventh amendment was adopted. 9 C. Wright & A. Miller Federal Practice and Procedure §§ 2302 at 14-15(1971). Because actions against foreign sovereigns were not permitted in 1791, we conclude that the seventh amendment does not require a jury

in a suit against a corporation owned by a foreign sovereign.

The Second, Third, Fourth, and Fifth Circuits already have held that the FSIA's requirement of a nonjury trial does not violate the seventh amendment. Goar, 688 F.2d at 424-27; Rex, 660 F.2d at 65-69; Williams, 653 F.2d at 881-83; Ruggiero, 639 F.2d at 878-81. Writing for the Second Circuit in Ruggiero, Judge Friendly reviewed the history of the immunity of foreign sovereigns from suits. 639 F.2d at 878-879. At common law, suits against foreign sovereigns were not permitted. See The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136-37, 3 L.Ed. 287 (1812). This immunity was based upon the principle that all sovereigns possessed "equal rights and equal independence" under international law, and that a sover-

eign enters the territory of a friendly foreign nation confident that immunities conferred upon it by reason of its sovereignty will be preserved. Id. The same immunity extended to commercial entities owned by foreign governments. Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1088 (1926). During the middle of this century, international custom changed, and the Supreme Court began to recognize that whether a foreign government should be afforded immunity from liabilities arising out of commercial transactions should depend upon whether the State Department considered the abolition of immunity in the circumstances to be inimical to United States foreign relations. See Republic of Mexico v. Hoffman, 324 U.S. 30, 65 S.Ct. 530, 89

L.Ed. 729 (1945); Ex Parte Republic of Peru, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943). Congress, apparently dissatisfied with the results obtained under this system, directed the federal courts to determine whether immunity should be accorded in particular circumstances, using the categories codified by the FSIA as guidance. See H.R Rep. at 7, 1976 U. S. Code Cong. & Ad.News at 6605-06.

Thus it is clear that suits against foreign governments or commercial entities controlled by them only recently have been permitted to go forward. Even now, these lawsuits have been allowed only because of a change in executive and legislative policy, not by operation of common law principles-the law of liability of foreign sovereigns is in fact suit generis. Rex, 660 F.2d at 68; Ruggiero, 639 F.2d at 881.

If these suits were not permitted in 1791, it is inexorably clear that no right to a jury trial attached under the seventh amendment. Nothing has been presented that contradicts this conclusion. Therefore, we agree with the other circuits that have considered the issue, that the FSIA's nonjury trial requirement does not offend the seventh amendment.[7]

[7]. We caution that our analysis does not mean that the seventh amendment is not applicable to any cause of action created after 1791. Rather, seventh amendment rights may attach to a cause of action not in existence in 1791, "if it involves rights and remedies of the sort traditionally enforced in an action at law or its nearest historical analog is an action at common law." Goar, 688 F. ad at 427; see Purnell v. Southall Realty, 416 U.S. 363, 94 S.Ct. 1723, 40 L.Ed.2d 198 (1974); FDIC v. New London Enterprises, 619 F.2d 1099 (5th Cir.1980). The distinction involved in this case is that a waiver of immunity creates rights and remedies that never before existed. Goar, 688 F.2d at 427; Ruggiero, 639 F.2d at 880-881.

(7, 8) Appellants' equal protection argument is also without merit. There is a rational basis for Congress' decision to classify commercial entities owned by foreign governments in the same category as the governments themselves, in that historically both were afforded immunity as foreign sovereigns. See Berizzi Bros., 271 U.S. at 574, 46 S.Ct. at 612. The stated reason for disallowing jury trials in actions against foreign states was "to promote a uniformity in decision when foreign governments are involved." H.R. Rep. No. 1487 at 13; 1976 U.S.Code Cong. & Ad. News at 6611-12. Further, suits brought against the United States may be tried to a jury only if the right is guaranteed by an appropriate statute. Galloway v. United States, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943). In

many instances it is not. See generally 5 J. Moore, Federal Practice (38.31(2) (2d ed. 1984). Congress could have considered that it should subject foreign states engaged in commercial activity to lawsuits on the same terms the United States must defend itself.[8] Such a consideration can

8. Each of the courts that has upheld the FSIA's nonjury trial requirement has analogized this provision to the denial of jury trials in suits against the United States. Goar, 688 F.2d at 426; Rex, 660 F.2d at 67; Williams, 653 F.2d at 882; Ruggiero, 639 F.2d at 879-81. The Supreme Court on several occasions has reaffirmed that there is no seventh amendment right to a jury trial in those instances when the United States has waived its sovereign immunity. Lehman v. Nakshian, 453 U.S. 156, 101 S.Ct. 2698, 2701-2701, 69 L.Ed.2d 548 (1981) (because of United States' immunity from suit, seventh amendment right never existed with respect to suit against United State, and does not attach when immunity has been waived); Galloway v. United States, 319 U.S. 372, 388-89, 63 S.Ct. 1077, 1086, 87 L.Ed. 1458 (1943) ("It can hardly be maintained

> that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign."); McElrath v. United States, 102 U.S. (12 otto 426, 440, 26 L.Ed. 189 (1880) (suits against the United States in the Court of Claims are not suits at common law; the United States cannot be suit without its consent and this principle necessarily permits the sovereign to prescribe procedures to be used in such suits). Although there are different rationales for the immunities, this does not affect the seventh amendment issue. Goar, 688 F.2d at 426; Ruggiero, 639 F.2d at 880. "A suit against a foreign state was just as unknown to the common law of 1791 as was a suit against the United States." Ruggiero, 639 F.2d at 880.

be viewed as important to the United States' foreign relations. This does not mean Congress could require that a case be tried without a jury whenever it concludes it is a good idea. Such a decision would be subject to scrutiny under the seventh amendment. But where, as here, this decision does not invoke seventh amendment implications, we can consider

only whether the decision bears a rational relationship to a legitimate governmental objective. See G.D.Searle & Co. v. Cohn, 455 U.S. 404, 102 S.Ct. 1137, 1141, 71 L. Ed.2d 250 (1982); Harris v. McRae, 448 U. S. 297, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980). We conclude that it does.

Thus, the district court was correct in trying the case without a jury.

IV. WHETHER THE DISTRICT COURT ERRED IN RULING IN FAVOR OF APPELLANTS

Appellants next content that the district court incorrectly rules in favor of Dominicana on the negligence and breach of contract claims. We reject their arguments with respect to both claims.

A. Negligence: Breach of Duty to Warn

(9) Appellants argue that Florida Law requires that Dominicana, as a common carrier, exercise the "highest degree of

care, foresight, prudence and diligence reasonably demanded at any time by the conditions or circumstances that affected the passengers and the carriers." Werndli v. Greyhound Corp., 365 So.2d 177, 178 (Fla.Dist.Ct.App.1978) (quoting Whitman v. Red Top Sedan Service, Inc., 218 So.2d 213, 216 (Fla.Dist.Ct.App.1969)).[9] According to appellant, Dominicana breached its duty to exercise this degree of care because Dominicana previously had transported persons to the Dominican Republic who were not permitted to enter the country by immigration officials. Aware of this potential danger to its passengers,

[9]. None of the parties filed any papers stating an intent to raise an issue of foreign law pursuant to Fed. R.Civ.P. 44.1 Nor is there any contention that any law other than Florida's should govern the outcome of this case.

Dominicana nevertheless failed to provide any warning of this possibility.

We need not decide whether Florida law would obligate an airline to ensure that its passengers were aware that they might not be permitted to enter a foreign nation, because Dominicana's failure to warn cannot be seen as the cause in fact of appellants' injury.[10] See Stahl v. Me-

10. It is not even clear what such a warning would entail, or how effective it would be. It may be one thing to require that an airline carrying passengers internationally ensure that its passengers know that a valid passport and travel visa are necessary to enter a foreign country. See Compagnie Nationale Air France v. Castano, 358 F.2d 203, 208-09 (1st Cir.1966). A Dominicana agent testified that appellee does make sure that all passengers travelling internationally possess valid passports. To charge an airline that is responsible for warning passengers of other reasons why they may be denied entry would impose on it a difficult task. Cf. Sprayregen v. American Airlines, 570 F.Supp. 16, 17-18 (S.D.N.Y.1983) (it would be un-

> reasonable to require an airline to warn of how altitude changes might affect particular physical or emotional conditions of its passengers). Foreign nations may not disclose the reason why a person is denied entry. For example, in this case, there is nothing in the record that clearly explains why Ramiro Arango was refused entry into the Dominican Republic. Further, the court below found that Dominicana did not have access to the list of undesirable foreigners. Thus, the airline could do no more than state that for unknown reasons, the Dominican Republic has refused to allow certain travelers to enter its borders.

tropolitan Dade County, 438 So.2d 14, 17-19 (Fla.Dist.Ct.App.1983); Restatement (Second) of Torts §§ 432(1). Appellant Ramiro Arango testified at trial, and admitted in his deposition, that he knew that foreign nations do not permit everyone who attempts to travel within their borders to do so. Moreover, Ramiro testified that he himself had been denied entry into a foreign nation on three

occasions prior to the one that led to this litigation. Under these circumstances, Dominicana cannot be liable for failure to warn appellants that they might be turned away by immigration officials. See Perez v. National Presto Industries, 431 So.2d 667, 669 (Fla.Dist.Ct. App.1983); Wickham v. Baltimore Copper Paint Co., 327 So.2d 826, 827 (Fla.Dist. Ct.App.1976).

B. Misrepresentation

(10) Appellants advance another theory in their effort to impose liability upon Dominicana. Appellants purchased from Dominicana, for two dollars apiece, tourist visas that read "Welcome to the Dominican Republic." The cards were blank when they were tendered to the Arangos; the Arangos filled in their names and the

other required information. Appellants now argue that Dominicana misrepresented the nature of these cards, and that they were given the impression that "all would be taken care of with respect to their trip." It is not clear what representations the Arangos claim they relied upon. The cards do state the terms under which a tourist may travel in the Dominican Republic, but do not purport to guarantee that possession of a card will ensure entry into the Dominican Republic, nor did Ramiro Arango testify that any Dominicana agent told him that they would. This deficiency aside, the theory of recovery fails anyway because Ramiro Arango admitted that he was aware that each nation had its own rules with respect to the admission of tourists. Hence, appellants

cannot reasonably claim that they relied upon these alleged misrepresentations. See Butts v. Dragstrem, 349 So.2d 1205, 1206-07, (Fla.Dist.Ct.App.1977).

C. Duty to Provide Food and Lodging

Appellants further argue that Dominicana breached its duty to exercise care on behalf of its passengers by forcing them to spend the night in San Juan at their own expense. After denying the Arangos entry into the Dominican Republic, immigration officials ordered Dominicana to transport them out of the country. The Arangos were rerouted to San Juan, where, according to Ramiro Arango, they inquired about flights to Miami. Ramiro testified that Dominicana's San Juan agent told him to come to the airport the next morning. When Arango asked whether Dominicana would provide his family with food and lodging

for the evening, the Dominicana agent responded in the negative. The Arangos proceeded to a hotel, where they paid for lodging and meals.

(11,12) A common carrier is obligated to exercise a high degree of care with respect to the boarding, carriage, and disembarkment of its passengers. Atlantic Greyhound Lines v. Lovett, 134 Fla. 505, 184 So. 133, 136 (1938); Pividal v. City of Miami, 105 So.2d 502, 503 (Fla. Dist.Ct.App.1958). The requirement that carriers exercise this degree of care may extend to the provision of terminals into which passengers enter upon exiting the carrier. Eastern Airlines v. Dixon. 310 So.2d 336, 338 (Fla.Dist.Ct.App.1975) (Hendry, J., concurring). But see Werndl v. Greyhound Lines, 412 So.2d 384, 386 & n.3(Fla.Dist.Ct.App.1982). There is no

duty, however, that required Dominicana to pay for the Arangos' food and lodging in San Juan under the circumstances of this case. Dominicana was ordered by immigration officials to transport the appellants out of the country on the very next flight leaving for their country of origin. Ramiro Arango testified that the police even escorted him and his family through the airport and onto the aircraft. Dominicana had no control over the circumstances under which the Arangos were taken to San Juan. Furthermore, the Arangos make no claim that they were unable to pay for food and lodging for some reason attributable to the airline. To impose the duty requested would require airlines to guarantee the success of its passengers' travel ventures. We conclude, therefore, that Do-

minicana was under no obligation to pay the Arangos' food and lodging expenses incurred in San Juan.

D. Breach of Contract of Carriage

(13) Finally, appellants claim that their contract with Dominicana, created by the purchase of the airline ticket, was breached, because Dominicana did not return them to Miami as promised or pay for their transportation aboard another carrier. Once Dominicana was ordered to take the Arangos out of the country. Dominicana issued them tickets for passage to San Juan and from San Juan to Miami. The trip from San Juan to Miami was arranged aboard Eastern Airlines, because at the time Dominicana did not fly that route. The Arangos were not scheduled for any particular Eastern flight. The day after they arrived in San Juan, they flew to

Port-au-Prince, Haiti via Air France, using new tickets issued by Dominicana. Their return to Miami was aboard Pan Am. Ramiro Arango testified that he paid cash for the flight from Port-au-Prince to Miami.

The court below concluded that there was no breach of contract because the court found that the Arangos voluntarily decided to travel to Port-au-Prince instead of returning to Miami. This decision was made to enable the Arangos to vacation in Haiti as a substitute for their failed plans. Although Ramiro Arango testified that his family flew to Haiti in an effort to secure passage to Miami, there is substantial evidence in the record that contradicts this explanation. We can overturn the district court's finding on this issue only if it is clearly erroneous, Fed.

R.Civ.P. 52(a), and we conclude that it is not. We hold therefore that Dominicana did not breach its contract of carriage.[11]

V. CONCLUSION

Unfortunately for the Arangos, their vacation was not as planned. Under the theories advanced in this case, however, Dominicana cannot be held liable for their losses. The judgment of the court below in favor of Dominicana is therefore AFFIRMED. We instruct the district court to take the appropriate action in entering final judgment that will resolve the Arangos' claims against defendants Guzman and Trailways.

11. In their brief, appellants make several references to the opinion that disposed of the initial appeal in this case, apparently in an effort to establish that the district court's opinion violates the law of the case. This contention has no merit. The former Fifth Circuit ruled only that some of

the appellant's claims sufficed to survive a motion to dismiss, while observing that flaws in the theories of recovery may become evidence at a later date. Arango, 621 F.2d at 1381-82.